

April 10, 2017

By e-mail to: hq.foia@epa.gov

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (2822T)
Washington, DC 20460

Re: Freedom of Information Request

Dear Freedom of Information Officer,

This Freedom of Information Act (“FOIA”) request is submitted on behalf of the Sierra Club and the West End Revitalization Association (“WERA”) to request public disclosure of any and all comments submitted to the Environmental Protection Agency (“EPA”) on two draft revised guidance documents released by EPA in 2000, specifically the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)* and *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*; Notice, 65 Fed. Reg. 39,650 (June 27, 2000). (hereinafter “Draft Guidance Documents”). These Draft Guidance Documents concerned Title VI of the Civil Rights Act of 1964 (“Title VI”) and were targeted at recipients of EPA financial assistance and EPA officers investigating possible Title VI violations. In addition, Sierra Club and WERA also request public comments submitted in response to a Title VI draft final recipient guidance document published in 2005. See *Draft Final Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Final Recipient Guidance)*; Notice, 70 Fed. Reg. 10,625 (March 4, 2005). (hereinafter “Draft Final Public Involvement Guidance”).

The Sierra Club is one of the oldest, largest, and most influential environmental organizations in the United States. Founded in 1892, the Sierra Club has been a key player in the development of U.S. environmental law and policy. As part of its mission, the Sierra Club operates several environmental justice programs that aim “to discuss and explore the linkages between environmental quality and social justice, and to promote dialogue, increased understanding, and appropriate action.” Within this context, Sierra Club has filed Title VI complaints and seeks to improve its understanding of the legal approaches to address inequities in environmental protection, including enforcement with Title VI of the Civil Rights Act. Sierra Club also seeks to widely disseminate knowledge of Title VI with its national reach.

Founded in 1994, West End Revitalization Association (WERA) is a community development organization that services residents, homeowners, and landowners in five historic African-American neighborhoods in Alamance County and Orange County, North Carolina. As part of its vision to “[m]aintain sustainable historic African American communities through environmental protection, preservation, stabilization, and planned development,” WERA has filed complaints to enforce Title VI and seeks to gain a greater understanding of how Title VI can be employed to challenge actions that lead to racially discriminatory environmental harms in

North Carolina. WERA also aims to disseminate this knowledge broadly by leveraging its connections with networks of community-based organizations.

Sierra Club and WERA seek access the comments to understand how public commenters understood the strengths and weaknesses of EPA's proposals.

Pursuant to FOIA, 5 U.S.C. § 552, Sierra Club and WERA respectfully request the following records:

1. Any and all records, including letters, memos or other correspondence submitted to EPA in response to the publication of the Draft Guidance Documents in the Federal Register, from the date of publication (June 27, 2000) through the close of the public comment period (August 28, 2000). Such records include comments submitted or maintained in physical form or in electronic files, and includes any and all cover letters and any attachments associated with such comments.
2. Any and all records, including letters, memos or other correspondence submitted to EPA in response to the Draft Guidance Documents following the close of the public comment period (August 28, 2000) through the present (April 10, 2017). Such records include comments submitted or maintained in physical form or in electronic files, and includes any and all cover letters and attachments associated with any such correspondence.
3. Any and all records, including letters, memos, or other correspondence submitted to EPA in response to the Draft Final Public Involvement Guidance from the date of publication (March 4, 2005) through the close of the public comment period (April 3, 2005). Such records include comments submitted or maintained in physical form or in electronic files, and includes any and all cover letters and any attachments submitted with any such comments.
4. Any and all records, including letters, memos or other correspondence submitted to EPA in response to the Draft Final Public Involvement Guidance following the close of the public comment period (April 3, 2005) through the present (April 10, 2017). Such records include comments submitted or maintained in physical form or in electronic files, and includes any and all cover letters and any attachments associated with any such correspondence.

FEE WAIVER REQUEST

The Sierra Club and WERA meet the requirements for a fee waiver for this FOIA request and request a waiver of fees in connection with this request. In the event that EPA does not waive fees, we ask EPA to notify us of the basis for your decision and to provide an estimate of costs. Please do not move forward with actions that would require expenditures until Sierra Club and WERA have the opportunity to consider an appeal and the estimate of costs.

Particularly, "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interests of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(1)(1). EPA considers six factors when determining whether

to waive fees for a FOIA request. 40 C.F.R. § 2.107(1)(2)(i). As demonstrated below, each of the six factors weighs in favor of granting a fee waiver.

Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government.

The records requested concern EPA's draft guidance on the administration of Title VI of the Civil Rights Act. Specifically, these records concern EPA's expectations for recipients of federal funds and EPA employees who enforce Title VI. These are part of the government's broad objective and obligation to protect American's civil rights. These records unquestionably "concern identifiable operations or activities of the Federal government." *Id.* § 2.107(1)(2)(i).

Factor 2: Disclosure of the Requested Records Is Likely to Contribute to the Public Understanding of Government Operations or Activities.

The requested information "is likely to contribute" to an understanding of EPA's Title VI compliance activities because it will supply critically important information that is not currently available to the public. 40 C.F.R. § 2.107(1)(2)(ii). This request seeks comments submitted in response to three draft guidance documents published in the *Federal Register*. While the draft guidance documents are available via the Federal Register online and on EPA's website, public comments submitted in response to the documents are not available on Regulations.gov or through EPA's website. Upon being contacted by the Yale Law School Environmental Protection Clinic, EPA was not able to readily provide access to these public comments.

Access to these comments will provide clarity about how different commenting parties assessed and critiqued EPA's draft guidance documents. Notably, although EPA published the Draft Guidance Documents in the Federal Register in 2000 for comment, EPA failed to complete rulemaking. The Sierra Club and WERA are among a broad array of national, state and community-based groups that subsequently have requested that EPA modify and then complete such guidance and have an interest in reviewing the historical record related to the disposition of the Draft Guidance Documents. *See, e.g.,* Letter from Marianne Engelman-Lado et al. to Lisa Jackson, Administrator, EPA (Jul. 3, 2012), <http://www.cityprojectca.org/blog/wp-content/uploads/2016/03/Earthjustice-LDF-Exhibits-20160314.pdf>; Letter from Marianne Engelman-Lado et al. to Velveta Golightly-Howell et al., EPA Office of Civil Rights (March 14, 2016), http://www.pilcop.org/wp-content/uploads/2016/11/FINAL-Transition-Letter_11-17-2016.pdf (*see* letter at 7). Sierra Club and WERA expect that these comments will reflect a broad range of expert viewpoints about EPA's Title VI compliance activities. Comments may, for example, address subjects as diverse as commenters' previous experiences with EPA's Title VI compliance activities, policy recommendations for possible improvements, and views about how EPA may structure its relationships with state and local governments to promote Title VI compliance. Given that the Sierra Club and WERA do not otherwise have access to information about all comments that were submitted, this information would otherwise be difficult or impossible to collect.

Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience Interested in EPA's Compliance Activities Associated with Title VI of the Civil Rights Act.

Disclosure will “contribute to the understanding” of a broad audience interested in EPA’s Title VI compliance activities, environmental justice, and civil rights. Both of the requesters have staff and members who work at the intersection of civil rights and environmental protection. Both of the requesters have a strong interest in Title VI as a tool that may be used to protect vulnerable communities, especially communities of color.

Both organizations have the capacity and intention to disseminate the requested information to (1) their members, supporters, and partnering organizations, (2) policymakers at varying levels of government interested in promoting civil rights compliance, and (3) members of the news media, who will in turn may disseminate the information more broadly to the public.

The Sierra Club is a 501(c)(4) nonprofit organization and one of the largest environmental organizations in the world. The Sierra Club has several programs that work to integrate social justice and environmental protection. *See* <http://www.sierraclub.org/environmental-justice>. Many of the Sierra Club’s policy experts and lawyers work to protect communities of color that are disproportionately burdened by pollution, and therefore have a strong interest in enforcement of Title VI of the Civil Rights Act. The Sierra Club is currently a party in public interest litigation challenging EPA’s failure to meet statutory deadlines for issuance of preliminary findings and recommendations in Title VI investigations and alleging a pattern and practice of unlawfully withholding and unreasonably delaying action on open Title VI complaints.

The Sierra Club is able to disseminate its knowledge through many channels. For example, the Sierra Club has a number of physical and electronic newsletters, including the *Sierra Magazine*, and disseminates informational resources to its members and the wider public. *See also* <http://www.sierraclub.org>. The Sierra Club hosts many informational events for the public, and its lawyers and policy experts—many of whom work on environmental justice issues—frequently attend events and conferences to educate other public interest organizations, members of the media, and the public. The Sierra Club also has extensive contacts with international, national, regional, and local news organizations.

The West End Revitalization Association, a recipient of EPA’s 2008 Environmental Justice Achievement Award, has a long track record of addressing environmental health hazards affecting low-income communities in North Carolina. WERA leads numerous community education and outreach initiatives and training sessions, empowering communities to reduce and remove environmental pollution from their communities. WERA disseminates its information through training workshops for community members; participation in major public health conferences, workshops, and seminars; participation in government initiatives that seek to collect information from community organizations; and outreach to local and regional news organizations. *See* <https://archive.epa.gov/compliance/environmentaljustice/awards/web/pdf/wera.pdf>.

Through these varied mechanisms, the requesters intend to convey the requested information to the public to improve public understanding of how EPA construes and pursues its obligations under Title VI of the Civil Rights Act, how EPA's Title VI activities may be improved to better safeguard civil rights, how other federal departments and agencies might learn from EPA's Title VI activities, and the possibility of clarifying obligations pursuant to Title VI in the future.

Factor 4: The Public's Understanding of Government Operations Will Be Significantly Enhanced by Disclosure of the Requested Information.

Disclosure of the requested records will "contribute significantly to public understanding" of EPA's Title VI compliance activities. 40 C.F.R. § 2.107(l)(2)(iv). Consistent with EPA's mission to protect the civil rights of vulnerable communities, the requested comments will shed light on the public's reaction to EPA's Title VI compliance process at the time the draft guidance documents were published. The comments likely include the carefully considered views, interests, and supporting data of nonprofit organizations, community groups, environmental justice advocates, and other stakeholders about what they considered to be the strengths and weaknesses of the Title VI compliance and enforcement approach EPA outlined in the guidance documents.

Because many communities of color continue to face ongoing environmental harms and bear disproportionate environmental burdens, many affected communities, stakeholder organizations and individual members of the public continue to have a strong and ongoing interest in the improvement of EPA's Title VI compliance process. Some of these individuals and organizations currently lack adequate access to information about the historical evolution of EPA's Title VI compliance approach and problems that past commenters have identified with the process, including unclear legal standards, excessive delay in processing complaints, and a lack of transparency regarding the status of investigations. Providing access to past comments will significantly increase the level of public understanding regarding EPA's Title VI compliance and enforcement process by ensuring that past comments can inform current dialogue about the Title VI process.

We anticipate that the requested information will further public understanding of how Title VI compliance activities may be improved at the EPA and at other federal agencies and departments in the future. Because the *Draft Revised Investigation Guidance* was not finalized, public comments submitted in response to the draft guidance may be informative for future efforts by EPA to release guidance on Title V. In such an event, the interested public would benefit from easy access to these earlier comments.

EPA's External Civil Rights Compliance Office's 2015-2020 Strategic Plan indicates that ECRCO intends to "[i]ncrease proactive engagement with critical external partners and stakeholders, such as recipients and communities" and "[h]eighten transparency and accountability" by making policy guidance and other important documents and resources available to the public online. Providing public access to previously received public comments on EPA's guidance documents will both facilitate engagement of community stakeholders and enhance transparency.

Factor 5: The Requesters Have No Commercial Interest in the Requested Disclosure of Information.

The Sierra Club and WERA are nonprofit organizations that have no “commercial interest that would be furthered by the requested disclosure.” 40 C.F.R. § 2.107(1)(3)(i).

Factor 6: The Requesters’ Sole Interest in Disclosure Is To Promote the Public Interest.

The sole interest of the Sierra Club and WERA in obtaining the requested records is to inform the public about Title VI of the Civil Rights Act and its implications for recipients of federal funds, EPA’s enforcement officers, and other stakeholders. Since the Sierra Club and WERA have no commercial interest in the requested records, the request is not “primarily in the commercial interest of the requester.” *Id.* § 2.107(1)(3)(ii).

In sum, this request meets all of the six factors for a fee waiver. In the event that EPA does not waive fees, we ask EPA *not* to move forward with providing the information requested by the FOIA, notify us of the basis for your decision, and provide an estimate of costs.

INSTRUCTIONS FOR RECORD DELIVERY

Please send records to Marianne Engelman-Lado and Yumehiko Hoshijima at marianne.engelman-lado@ylsclinics.org and yume.hoshijima@ylsclinics.org or mail them to:

Yale Law School Environmental Justice Clinic
c/o Marianne Engelman-Lado and Yumehiko Hoshijima
127 Wall Street
New Haven, CT 06511

In the event that you have any questions concerning the type of materials we request, or have concerns regarding the scope of the request, please contact Mr. Yumehiko Hoshijima by e-mail at yume.hoshijima@ylsclinics.org or by telephone at (858) 926-9259.

Thank you for your assistance in this matter.

Sincerely,

Marianne Engelman-Lado

A handwritten signature in black ink, appearing to read 'M Eng Lado', with a stylized flourish at the end.

Yumehiko Hoshijima

Patrick Woolsey

Yale Law School Environmental Justice Clinic
127 Wall Street
New Haven, CT 06511

Submitted on behalf of:

Leslie Fields
Director, Environmental Justice & Community
Partnerships Program
Sierra Club
Washington, DC

Omega Wilson
Environmental Justice Consultant
West End Revitalization Association
Mebane, NC